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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 346

LOUISIANA DELTA CATTLE CO., INC.,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF FOR PETITIONER.

CAMDEN R. MCATEE,
Counsel for Petitioner.

Of Counsel:
MASON, SPALDING & MCATEE,
OGDEN & WOODS.

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THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully petitions that a writ of certiorari issue to review the judgment entered May 5, 1941, in the Court of Claims of the United States in the above entitled cause.

The Judgment Below.

The judgment of the Court of Claims of the United States was entered May 5, 1941 (R. 11) in cause No. 43575, Louisiana Delta Cattle Co., Inc. *v.* The United States (92 Ct. Cls. —) sustaining a motion to dismiss, and thereby dismissing the petition below for recovery of $159,002.25 as the value

of property allegedly taken for public use by the erection of a certain levee to straighten the Mississippi River channel, by a cut-off of petitioner acreage from natural and existing protection against waters, for purposes of Flood Control.

Certified copies of the record, inclusive of the petition, motion to dismiss, opinion and judgment below, accompany this petition.

Questions Presented.

(a) Whether the petition below states a sufficient cause of action when construed in reference to decisions of this Court, and particularly its recent decisions in *United States* v. *Sponenbarger*, 308 U. S. 256, and *Danforth* v. *United States*, 308 U. S. 271.

(b) Whether the dismissal of the petition is in conflict with said decisions and other precedents.

The Constitution and Statute Involved.

The Vth Amendment provides: "nor shall private property be taken for public use without just compensation." The Flood Control Act of 1928 declares the sense of Congress that no further private contribution beyond rights of way for levees shall be required. These sections are set forth in the Congressional Committee report in the Appendix to the Supporting Brief.

Statement of the Case.

The court below, in its opinion upon the motion to dismiss (R. 7-11) succinctly summarizes the facts of the case presented in the petition, and dismiss the petition (R. 11), on the ground "everything alleged is prospective." In the opinion summary the following material facts are stated; (petitioner italics):

> "Plaintiff is a corporation, and in its petition alleges that it is the owner of certain tracts of land, described

at length therein, embracing 4,663.52 acres located adjacent or near the Mississippi River, and that at the time of the acquisition of this real property the same was *defended and protected against flood or water submergence by public levees* along the banks of the Mississippi River upon said property whereby the *property was arable and of value and subject to drainage of rainfall;* that, notwithstanding said conditions so existing, the defendant by its authorized agencies, on or about July 13, 1931, and thereafter, and acting within the scope and under authority of the Flood Control Act did select and locate a set-back or new levee line as part of a certain procedure adopted by defendant and known as the Jadwin Plan of Flood Control of the Mississippi River; * * * , whereby the new levee was tied into the previously existing levees in or about the months of July or October 1934, and *drainage outlets previously existing were stopped and made ineffective;* that by the West Point New Levee defendant has materially lessened and shortened the west bank levee line on the Mississippi River and has thereby *taken from plaintiff and placed on the river side all lands and improvements of plaintiff* lying east of the West Point New Levee, within the intendment and meaning of the Fifth Amendment to the Constitution and the Flood Control Act.

"Plaintiff states, by the West Point New Levee constructed and tied to existing levees at both ends, defendant has segregated and excluded all land and improvements of plaintiff from levee protection and from drainage, whereby the land and improvements, through lack of drainage, will be inundated by the natural rainfall, which averages sixty inches annually, and converted into a bog or marsh unfit for cultivation or other use, and whereby, in event of abandonment or removal of the previous levees around the property, which abandonment or removal plaintiff alleges and charges defendant purposes to accomplish and obtain, the river waters will be induced to break through upon the lands of plaintiff in the establishment of a new channel thereon, thereby putting the lands permanently

in the bed of the river, or establishing constant flowage rights thereon, and by the acts of the defendant, the lands of plaintiff will be made unfit and entirely destroyed.

"The plaintiff further states that by the adoption of the Jadwin Plan of Flood Control and the enactment of the Flood Control Act, as amended, the defendant has assumed full responsibility for the control of the flood waters of the Mississippi River and its tributaries; that by its acts aforesaid, the defendant *has deprived and does deprive the plaintiff of levee protection* on the west bank of the Mississippi River, and of drainage as previously existing and enjoyed by the plaintiff, and *has exposed the lands and improvements* of the plaintiff *to overflow of the waters* and *has caused the lands and improvements* of the plaintiff *to be and remain unprotected in the making of the new channel,* and thereby *to be made entirely without further value to plaintiff,* and *to be taken for public use, damaged and destroyed, without making compensation therefor to plaintiff.*

"Plaintiff further states that before the construction of the West Point New Levee, and on and after July 13, 1931, the land and property of plaintiff, with improvements, were *worth not less than $159,002.25;* but that since its construction is *without saleable value* and the *use thereof for all practical purposes has been taken and destroyed, to the consequent loss or damage of plaintiff in the full value thereof,* as above stated."

Ruling Below.

The ruling below is that the petition below does not state a cause of action (R. 11) and should be dismissed.

Specifications of Error.

The court below erred:

1. In holding said petition does not state a good and sufficient cause of action when tested by the motion to dismiss.

2. In holding the said petition is insufficient when tested by the *Sponenbarger, Danforth* and related decisions.

Reasons for Granting the Writ.

1. The validity of the Flood Control Act being unquestioned, petitioner is confined to the legal right of recovery, under the Tucker Act, of the same compensation awardable in a condemnation proceeding.[1] The right, reflecting the constitutional guarantee—"nor shall private property be taken for public use without just compensation"—requires close inquiry into every case. Herein acts done in and before 1934 are the basis of the petition in 1937, and are admitted by the motion to dismiss. The conclusion below "that everything alleged is prospective" conflicts with the ruling of this Court as to the sufficiency upon demurrer of a very similar petition,[2] as follows:

> "As we have said, the intent and overt acts are alleged, as is also the conclusion that the United States has taken the land. That we take to be stated as a conclusion of fact, and not of law, and as intended to allege the actual import of the foregoing acts. In our opinion the specific acts set forth would warrant a finding that a servitude has been imposed."

Between the truth of the facts alleged and admitted by the motion, and the denial of their truth, by sustaining the motion to dismiss, there is conflict so evident petitioner feels obliged to restate its grievance for consideration by this Court. The lawful right to be heard on the merits believed improperly denied below, is the primary issue sought to be upheld herein.

2. Principles of decision recently laid down by this Court in its *Sponenbarger* and *Danforth* opinions involving flood-

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[1] *Hurley* v. *Kincaid,* 285 U. S. 95, 104.

[2] *Portsmouth Harbor L. & H. Co.* v. *United States,* 260 U. S. 327, 330.

way diversion situations are submitted not to be entirely applicable to situations involving channel stabilization. The temporary servitude imposed in a floodway is less than the permanent servitude imposed in the conversion of private property into bog and ultimately into river-bed. Further statement of the principles of decision applicable to such different situations appears desirable.

3. The desirability of such statement is suggested by the later decision [3] of this Court that the need or wisdom and incidents of Flood Control projects are matters for the Congress and not for the courts, where the Government is to acquire the inundated land and there is no complaint about just compensation being received by the private owner. In reference to the present case, it will appear Congress has twice sought to provide compensation to petitioner, and that the right to claim same stands defeated by administrative, executive and judicial attitudes unless restored as the result of this petition.

In the supporting brief, the further viewpoint of petitioner on the questions and matters involved herein is respectfully presented.

WHEREFORE, it is respectfully submitted that this petition should be granted.

CAMDEN R. MCATEE,
Attorney for Petitioner.

Of Counsel:
MASON, SPALDING & MCATEE,
OGDEN & WOODS.

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[3] *Oklahoma* v. *Guy F. Atkinson Co.*, (opinion June 2, 1941) — U. S. —.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 346

LOUISIANA DELTA CATTLE CO., INC.,
Petitioner,

vs.

THE UNITED STATES.

BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR CERTIORARI.

Supplementing and supporting the petition, it is respectfully shown for petitioner:

Opinion Below.

The opinion of the Court of Claims of the United States was rendered on May 5, 1941 (92 Ct. Cls. —; — Fed. Supp. —), and appears at pages 7-11 of the Record.

Jurisdiction.

Under Section 288 of the Judicial Code as amended, the jurisdiction of this Court is invoked. (U. S. C. A., Title 28, Section 129.)

The date of the judgment below sought to be reviewed is May 5, 1941. The petition for certiorari was filed in this Court on August 4, 1941.

Statement of Case.

Reference is made to the statement in the petition for purposes of brevity.

Reasons for Review and Specifications of Error.

These, stated at length in the petition, are briefly that the petition below is sufficient when tested by the motion to dismiss and construed by decisions of this Court, and that its dismissal below was error, and is suggestive, as such, of conflict with the trend of decision determinative of the legislative intent and obligation always and fully to recognize and protect private rights of property.

ARGUMENT.

Summary.

Petitioner, for argument in support of its petition, poses:

I. That the case of petitioner has a distinct legislative background, sustaining its right to claim compensation, and impliedly recognized by this Court subsequent to the judgment below.

II. That the petition below is not ruled by the principles adopted by the court below from the *Sponenbarger* and *Danforth* opinions of this Court, and from related decisions of the Court of Claims.

III. That the ruling below suggests a conflict with decisions of this Court.

I. The legislative background and its recognition. The legislative background indicative of the intent of Congress to provide compensation for private property taken for public use in the execution of Flood Control projects, being for judicial notice or otherwise evidentiary, does not appear in the petition below.

In the Appendix appear the Senate Committee Report (Report No. 1192) and Presidential Veto Message (No. 305) regarding the Wilson Bill, (H. R. 7349, 74th Cong. 1 Sess.) enacted by the Congress in 1935, in which the provisions of Sections 2 and 3 of the Flood Control Act of 1928 are stated. These original sections express the declared sense of Congress that no further local contributions to the project other than rights of ways for levees or levee foundations will be required because of the prior large voluntary contribution of $292,000,000 by local interests.

The Wilson bill amended the original Flood Control Act and provided for the special acquisition of flowage rights over private lands, as put on the riverward side of the new project levee lines, with funds previously appropriated and saved in its execution. The committee report expressly describes the situation of petitioner (p. 4) as follows:

> "At Wilson Point, or Bunches Bend, in East Carroll Parish, the set-back and relocation of the levee line cuts across the bend and places 9,600 acres of highly improved and cultivated land between the newly located levee and the main river channel. The distance around the point, the location of the old levee, is 15½ miles; the distance across the point, the location of the new levee, is 3.7 miles. This represents a saving to the Government of $906,000. In addition to saving $906,000 in actual cost of construction, the new levee is on high ground and permanent location and therefore avoids the cost of maintaining by bank revetments or replacements in event of caving. The amount saved would, in this particular instance, be several times the sum necessary to compensate the landowners whose lands, for all intents and purposes, are made a portion of the channel of the Mississippi River. This property has been protected from floods since 1840. In flood time in the future it will be used, for all intents and purposes, as part of the main channel of the river to carry excessive flood waters."

Thus, the Congress sought to recognize the government should not save inequitably at the entire expense of private owners. Against this policy, it will be noted the War Department and the Veto message take the contrary view that the loss of the private owner is a further necessary local contribution, and so defeat the sense of Congress originally declared and again reiterated.

On June 2, 1941, and subsequent to the judgment below, in its opinion in *Oklahoma* v. *Guy F. Atkinson Co.*, this Court held the need, wisdom and incidents of a Flood Control project are for the Congress and not for the courts. In the *Danforth* opinion, previously, special condemnation proceedings provided in the original Flood Control Act are noted. Petitioner is declared in the *Hurley* opinion entitled to recover the same compensation awardable in such condemnation proceeding. Sufficient allegation of the taking a compensible servitude appears established in the petition below under the *Portsmouth* opinion. This trend of decision toward giving effect to the Congressional intent, suggests a definite conflict when the right of petitioner to be heard upon the merits of the petition below is denied.

II. The petition below is not ruled by the decisions cited below. The *Sponenbarger* and *Danforth* opinions, and related opinions of the Court of Claims, do not rule the sufficiency of the petition below. *Sponenbarger* and *Danforth* both objected to the possibility of the accelerated flooding of their acreages in natural floodways when and if the flow of floods through other natural spillways was diverted and drained over their acreages. Petitioner, on the other hand, objects to an actual cut-off for channel stabilization that has stagnated its arable acreage into a swamp and ultimately will relegate the acreage to the permanent river-bed. Actually the *Sponenbarger* acreage escaped the flood of 1935 and has been continually farmed, as the result of the spill-

way aspects of the project. In contrast, petitioner-acreage has become a useless swamp as the result of the cut-off aspect of the project.

The *Danforth* acreage has entirely another aspect in that it was acquired and compensated for in statutory condemnation proceedings. The sole question was whether the prior agreement of the parties upon its value was enforceable and bore interest. The right of *Danforth* to enforce the agreement was upheld with denial of interest because neither the statute nor the agreement provided for the allowance of interest.

The Court of Claims justifies, by the *Danforth* opinion, its conclusion that the adverse effect of legislation upon changes in value as incidents of ownership is not a constitutional taking, and, by the *Sponenbarger* opinion, justifies its conclusion that there is no liability for damages from conjectural major floods. Admitting each opinion premise as correct, it is actual erection of the cut-off levee, not its legislative authorization alone, of which petitioner complains; it is the consequent destruction of drainage, the conversion of arable land into a bog, not alone the conjecture that some day flood waters will overflow the acreage, of which petitioner complains. Therefore, petitioner presents a case to which these opinion premises do not apply.

Petitioner would emphasize the different situation of its acreage as the result of building the cut-off levee as compared with acreage in floodways. In the *Sponenbarger* opinion, Mr. Justice Black clearly states the distinction:

> "* * * the government's problem was by channel stabilization, dredging, cut-offs or other effective means to prevent diversions from the Mississippi at all points if possible. But if all diversions could not be prevented, the government sought to limit the floodway to the least possible number of spillways heading into natural floodways."

In the *Sponenbarger* and *Danforth* cases, it was a set-back levee, not a cut-off levee, that provoked the controversy. The distinction is, as shown in the opinions, that the set-back levee was five miles behind the river levee which was fully maintained. When the river levee proved insufficient, the set-back levee would confine the flood waters until they subsided and drained back into the Mississippi through drainage apertures. On the contrary, the cut-off levee in the present case, although also called a set-back levee, serves only as a bank of the flowing river. There is no provision for continued maintenance of the river-side levees, or for drainage of the accumulations of water upon the surrounded acreage. Both the river waters and the swamp created inside them by the cut-off levee betoken their disintegration, and the lapse of the petitioner acreage into the river bed.

Of a set-back levee, Mr. Justice Reed says in the *Danforth* opinion:

> "The government could become liable for a taking, in whole or in part, even without direct appropriation, by such construction as would put upon this land a burden, actually experienced, of caring for floods greater than it bore prior to the construction."

If the word "floods" embraces "waters", the increased burden upon petitioner acreage, as the result of drainage-destruction, of rainfall and percolation, aside from flood-flowage, and evidenced in the transformation of arable lands into swamp, is entirely described in this definition of liability.

The *Bennington Savings Bank* case, the *Kirch* case and the *Matthews* case, cited by the Court of Claims, are not decisive of the present case, because in each of them the consummated deprivation of property and valuable rights here alleged and admitted was found non-existent.

The petitioner-allegation that the annual 60-inch rainfall will inundate the acreage into a bog is a statement of a persisting seasonable accumulation of undrained waters created by the cut-off levee and not of a future and unmatured event as held by the court below. The abandonment or removal of the river levees for destruction of the acreage is a future event, but it is the alleged intent so to do that is the present and important feature under the *Portsmouth* opinion in determining the actionable weight of the petition. In other words, the intent exists as a fact until rebutted when the case is heard upon its merits.

In *Olson* v. *United States*, 292 U. S. 246, 257, of the value of flowage easements at the time of expropriation, this Court says:

> "The determination is to be made in the light of all facts affecting the market value that are shown by the evidence taken in connection with those of such general notoriety as not to require proof."

Petitioner therefore claims the taking at the completion in 1934 of the cut-off levee, as inclusive of naturally impending effects of loss of drainage, accummulation of annual rainfall and seepage waters productive of swamp, the incurrence of flood without means of subsidence, and ultimate abandonment to the river as the effective intent. The same impending matters would be proved as actual in a condemnation proceeding heard before the cut-off levee was built. They are matters of such general notoriety attaching to the situation as to be actual in 1937 when the petition below was filed, and thus to fit within the quoted principle of the *Olson* opinion.

This Court has repeatedly held the Court of Claims, in arriving at and adjudicating the justice of claims, is not bound by any special rules of pleading so as to preclude

recovery of what is justly due under the facts of a petition, although due in a different aspect from that in which the demand is conceived. (*United States* v. *Burns*, 79 U. S. (12 Wall.) 246, 254; *Clark* v. *United States*, 95 U. S. 539, 543; *United States* v. *Behan*, 110 U. S. 338, 347; *Wisconsin C. R. Co.* v. *United States*, 164 U. S. 190, 212; *District of Columbia* v. *Barnes*, 197 U. S. 146, 154.)

III. *The conflict of decision.* The conflict of the decision below with decisions of this Court has been suggested by the citation (petition, *supra*) of *Portsmouth Harbor L. & H. Co.* v. *United States*, 260 U. S. 327, 330, in which this Court passed for the third time upon the same case, after a demurrer to the petition was sustained by the Court of Claims. According to the petition a compensible servitude consisting of a firing-range was laid upon the land by governmental establishment of a fire control station and the intent of firing guns incapable of being fired except across the land. In the present case, the erection of cut-off levee, the destruction of drainage causing rain and percolation to accumulate and create a swamp, the intent of abandonment of the acreage to the river, and the taking of the acreage are alleged and admitted as true by the motion to dismiss. The denial of the sufficiency of the petition is submitted to conflict with the ruling of the cited case:

> "As we have said, the intent and overt acts are alleged as is also the conclusion that the United States has taken the land. That we take to be stated as a conclusion of fact, and not of law, and as intended to allege the actual import of the foregoing acts. In our opinion the specific acts set forth would warrant a finding that a servitude has been imposed."

The fundamental rights of private owners to compensation noted in the *Sponenbarger* and *Danforth* opinions but held not subject to application under the facts of those cases, have been previously mentioned. The present case is submitted to call for their application, and the denial of such rights is submitted as involving conflict.

Citation is submitted as unnecessary to establish that the drainage-rights appurtenant to petitioner acreage are the same as an outlet, pathway, or sole exit, and have been taken and destroyed by the cut-off levee. In *United States* v. *Welch*, 217 U. S. 33, a private right of way is held to be land, and its destruction for public purposes to amount to appropriation, so that its value is not ascertainable without reference to the dominant estate to which it is attached. In this aspect, there is a conflict when recovery of the drainage rights measured for value by their effect upon the acreage is denied by dismissal of the petition below.

Where external works constructed by the government served to cut off drainage and produce seepage and percolation that converted a plantation into an irreclaimable bog, in adjudging liability this Court said in *United States* v. *Lynah*, 188 U. S. 445, 469-70:

> "While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested. Of course, it results from this that the proceeding must be regarded as an actual appropriation of the land, including the possession, the right of possession and the fee; and when the amount awarded as compensation is paid, the title, the fee, with whatever rights may attach thereto, in this case those at least which belong to a riparian proprietor, pass to the government and it becomes henceforth the full owner."

Petitioner cannot obviate or overcome the conditions produced by the cut-off levee. Thus, its raise of the river-levees would uselessly fend off conjectural floods while its walled acreage would remain a swamp and bog.

It is submitted that the petition for certiorari should be granted with all appropriate relief.

Respectfully,

CAMDEN R. MCATEE,
Attorney for Petitioner.

Of Counsel:
MASON, SPALDING & MCATEE,
OGDEN & WOODS.

Calendar No. 1235

74TH CONGRESS, 1st Session | SENATE | REPORT No. 1192

AMEND THE ACT ENTITLED "AN ACT FOR THE CONTROL OF FLOODS ON THE MISSISSIPPI RIVER"

JULY 29 (calendar day, AUGUST 1), 1935.—Ordered to be printed

Mr. OVERTON, from the Committee on Commerce, submitted the following

REPORT

[To accompany H. R. 7349]

The Committee on Commerce, to whom was referred the bill (H. R. 7349) to amend the act entitled "An act for the control of floods on the Mississippi River and its tributaries, and for other purposes", approved May 15, 1928, as amended, having considered same, report it to the Senate with the recommendation that it do pass.

The Committee on Flood Control of the House clearly and cogently set forth the reasons for the enactment of this bill in a report submitted to the House, from which we excerpt the following:

This proposed amendment to the Flood Control Act of 1928 provides compensation by the United States for lands, farms, homes, and property taken by the Federal Government for the passage of the flood waters in the main channel of the Mississippi River within the adopted project from Cape Girardeau, Mo., to the Gulf of Mexico.

When the Congress approved and adopted this project as a national obligation and responsibility, section 2 of the Act No. 391, Seventieth Congress, set forth the reasons therefor as follows:

"SEC. 2. That it is hereby declared to be the sense of Congress that the principle of local contribution toward the cost of flood-control work, which has been incorporated in all previous national legislation on the subject, is sound, as recognizing the special interest of the local population in its own protection, and as a means of preventing inordinate requests for unjustified items of work having no material national interest. As a full compliance with this principle in view of the great expenditure estimated at approximately $292,000,000, heretofore made by the local interests in the alluvial valley of the Mississippi River for protection against the floods of that river; in view of the extent of national concern in the control of these floods in the interests of national prosperity, the flow of interstate commerce, and the movement of the United States mails; and, in view of the gigantic scale of the project, involving flood waters of a volume and flowing from a drainage area largely outside the States most affected, and far exceeding those of any other river in the United States, no local contribution to the project herein adopted is required."

Exceptions thereto are stated in section 3 of the same act, Public, No. 391, Seventieth Congress, as follows, and which it is the purpose of this bill to clarify them.

"SEC. 3. Except when authorized by the Secretary of War upon the recommendation of the Chief of Engineers, no money appropriated under authority of this Act shall be expended on the construction of any item of the project until the States or levee districts have given assurances satisfactory to the Secretary of War that they will (a) maintain all flood-control works after their completion, except controlling and regulating spillway structures, including special relief levees; maintenance includes normally such matters as cutting grass, removal of weeds, local drainage, and minor repairs of main river levees; (b) agree to accept land turned over to them under the provisions of section 4; (c) provide without cost to the United States, all rights-of-way for levee foundations and levees on the main stem of the Mississippi River between Cape Girardeau, Missouri, and the Head of Passes."

It is also the purpose of this bill to provide just and fair relief to citizens of many States within and without the Mississippi Valley whose lands were protected when the act was passed but which have been sacrificed for flood contol purposes in the execution of the plans approved by the Congress.

The basic exception in section 3 is that the States and levee districts shall "(c) provide without cost to the United States, all rights-of-way for levee foundations and levees on the main stem of the Mississippi River between Cape Girardeau, Mo., and the Head of Passes." This exception has been fully complied with, in addition to the $292,000,000 expended by local interests before the passage of the act of 1928. The same local interests, in cooperation with the Federal Government, have complied with this exception, contributing $41,403,608.66, as shown by the records of the Mississippi River Commission and the Chief of Army Engineers.

This exception limited the obligation of the local interests to acquiring rights-of-way for levees and levee foundations. Therefore, as a matter of reasonable and legal interpretation, other obligations imposed by the changes and relocations of levee lines cannot be imposed upon the local interests but is an obligation of the United States Government.

Considerable interest has been shown as to the land, acreage, and cost involved in such an undertaking, and in order that the Congress might have definite information from the Government agency in charge, this committee requested a report for that purpose, which is given in the following letter from the Chief of Army Engineers:

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
Washington, D. C., April 23, 1935.

Hon. RILEY J. WILSON,
House of Representatives, Washington, D. C.

MY DEAR JUDGE WILSON: Complying with your recent telephonic request, I have obtained from General Ferguson, president Mississippi River Commission, a report listing the total acreage included between the setback levees and the original levees as 74,670.

General Ferguson also advises me that the total cost of the flood-control projects borne by local interests below Cairo since the act of May 15, 1928, has been $41,403,680.66.

Very truly yours,

E. M. MARKHAM,
Major General,
Chief of Engineers.

The lands, about 75 percent of which were in cultivation before the levee changes were made, are located in the States of Missouri, Kentucky, Arkansas, Mississippi, and Louisiana, and practically all owned by individual farmers.

As to the cost of the project herein proposed, the Acting Secretary of War reports as follows:

WAR DEPARTMENT,
Washington, D. C., May 14, 1935.

Hon. RILEY J. WILSON,
Chairman Committee on Flood Control,
House of Representatives, Washington, D. C.

DEAR JUDGE WILSON: I am in receipt of your letter of May 6, 1935, requesting a report on bill H. R. 7349, to amend the act entitled "An act for the control of floods on the Mississippi River and its tributaries, and for other purposes", approved May 15, 1928, as amended.

The bill provides that the United States shall pay for the cost of flowage rights over all lands, which were protected by the main Mississippi River levees on

May 15, 1928, but which have since been left, or may hereafter be left, on the river side of the controlling main river levee lines constructed on new locations under the adopted flood-control plan.

Set-backs, or relocations, of levee lines are, and always have been, a part of flood-control operations along the Mississippi River and are included in the flood-control plan adopted by the act of May 15, 1928. This act leaves to States or levee districts the function of providing rights-of-way for levees along the main Mississippi River.

The value of flowage easements over lands left riverward of main river controlling levees since the passage of the Flood Control Act has been estimated at approximately $2,000,000. Advance determination of the total cost for the entire project is difficult but has been roughly approximated at $4,000,000. The area already involved, exclusive of borrow pits, amounts to about 56,000 acres. The total area for the entire project cannot be predetermined; but the project is about 80 percent completed, and most of the set-backs have already been made.

It is understood that some States or levee districts compensate owners for lands that are left on the riverside of a relocated levee line. Under their organic laws, other States or levee districts do not compensate. The War Department has the utmost sympathy for an owner whose property is injured without compensation. It believes that such owners deserve equitable treatment and compensation for flowage easements over their lands.

The Department's position, however, is that any deserved payments should be made by those to whom the benefits of the levee lines directly accrue and not by the United States.

The War Department therefore views this proposed legislation unfavorably.

Sincerely yours,

HENRY H. WOODRING,
Acting Secretary of War.

While as a matter of policy the above report does not favor payment by the United States, it admits and confirms the fairness and justice of the claims of those whose property has been sacrificed for the general welfare, and without their consent.

The complete survey of the land acreage involved, with the plans completed, is 74,670 acres; on the same basis valuation as used in this report, the total cost would be approximately $5,000,000.

The report states:

"The War Department has the utmost sympathy for an owner whose property is injured without compensation.

"It believes that such owners deserve equitable treatment and compensation for flowage easements over their lands."

These are the same conclusions reached by the Committee on Flood Control of the House of Representatives, after extensive hearings.

The sole and only issue is as to where rests the obligation for compensation. For the reasons heretofore given, as a matter of law and equity, the obligation rests upon the United States.

The passage of this bill will not impose any additional burden upon the Federal Government. It would have cost more to maintain the old levee lines protecting the lands in 1928 by bank revetment, which was provided for in the act, than is required for payment for the use of that confiscated by set-backs and relocations.

As illustrations of these facts, the following examples are cited:

ARKANSAS

A challenging illustration of the effects of the relocation of levee lines, the actuating motives and destructive effects visited upon property interests may be found in the situation at Pecan Point in Arkansas. The name indicates the shape of the land in that place. The area comprises 3,200 acres, of which 3,000 acres are in a high state of cultivation with all necessary building improvements, including commodious farm houses occupied by the owners. The lands enjoyed levee protection under structures provided by local agencies from the inception of flood stages. When the adopted project was placed in execution, the Army engineers investigated the situation at Pecan Point and caused an estimate to be made, disclosing that the cost of bringing the existing levee lines to the increased grade and section fixed under such project would be $650,000, whereas the cost of constructing a levee of same grade and section 2½ miles in length, joining the levees above and below, could be constructed for $250,000. The first method would provide the standard levee and afford complete protection to the 3,200 acres

involved. The latter would save $400,000 and destroy the 3,200 acres. The engineers adopted the latter plan, constructing the cut-off levee and condemning the property.

Another instance is at Helena, in Arkansas, where, in order to locate the permanent levee line according to the standard of good engineering it was considered necessary to change the location. The area was immediately south of the corporate limits of the city, and as usual in such instances, the industrial section abutted the municipal limits, rendering necessary the acquisition of the rights-of-way through such developed area at an unusual expense, from the standpoint of actual foundation values and the cost of moving existing structures and destruction of so much of the limited space necessary to the proper operation of the industries as to destroy convenient and accessible operations thereon. The local agency was financially unable to procure the rights-of-way, which in turn resulted in the abandonment of the plan based on proper engineering theory, and in order to avoid a weak link in the levee system it became necessary for the engineers to increase the size of the existing levee, the site of which was condemned by their expert knowledge.

LOUISIANA

A striking example and an impressive instance of the effect of proposed set-backs and changes in levee lines may be found in northeast Louisiana, in the territory comprising the Fifth Louisiana Levee District.

At Wilson Point, or Bunches Bend, in East Carroll Parish, the set-back and relocation of the levee line cuts across the bend and places 9,600 acres of highly improved and cultivated land between the newly located levee and the main river channel. The distance around the point, the location of the old levee, is 15½ miles; the distance across the point, the location of the new levee, is 3.7 miles. This represents a saving to the Government of $906,000. In addition to saving $906,000 in actual cost of construction, the new levee is on high ground and permanent location and therefore avoids the cost of maintaining by bank revetments or replacements in event of caving. The amount saved would, in this particular instance, be several times the sum necessary to compensate the landowners whose lands, for all intents and purposes, are made a portion of the channel of the Mississippi River. This property has been protected from floods since 1840. In flood time in the future it will be used, for all intents and purposes, as part of the main channel of the river to carry excessive flood waters.

At Australia Point the distance around the bend is 9.6 miles, the location of the old levee; the distance across the point is 1.4 miles, the location of the new levee. This represents a saving to the Government of $513,000.

At Duckport, Madison Parish, the proposed change places between the new levee and the Mississippi River about 12,000 acres. At Somerset, in Tensas Parish, a set-back and relocation of the levee moves the line back from 4 to 6 miles and throws outside the new levee, or between the new levee and the Mississippi River, 20,000 acres. The major portion of these lands are highly improved property in cultivation. The relocation of levees across these points represents in each instance a material saving to the Government and a distinct loss in value and protection to the property owner.

MISSISSIPPI

Under the Flood Control Act of May 15, 1928, the local interests were required to furnish the rights-of-way for levees along the Mississippi River.

The Chief of Engineers estimated that the total costs of rights-of-way for levees to the local levee boards and to the local agencies would be approximately $4,000,000. At the time of the adoption of the project practically all rights-of-way for levees had been acquired and paid for by the local interests. It was thought that additional rights-of-way for the enlargement of the levees would be required. It was not contemplated that the levees would be set back as far as they have been located or that the levee line would be shortened across bends. In the execution of the project many set-backs have been made and many relocations have been constructed.

The purpose of the bill is to pay the reasonable value of the flowage rights, including compensation for damages to improvements, on lands that were protected by the main Mississippi levees on May 15, 1928, but which have been left out or may be left out on the river side of the main river controlling levees constructed on new locations under the adopted project.

The purpose of the act is to effectuate the intent of Congress with respect to local contribution. The Flood Control Act provides that the control of the

floods in the lower Mississippi River is a national problem. The local interests are required to furnish rights-of-way and to maintain the levees. Under the act, $80,000,000 was to be used for revetment and in aid of navigation.

In the execution of the project it has been found more economical to construct levees across points in the bends than to revet the caving banks. The act contemplated levees with a life of 20 years. As executed, the project has provided for levees with a life of 30 years. The result is that the local interests have been required to contribute a great deal more to provide rights-of-way than was contemplated by the act. At the same time, the Government has saved a great deal by set-backs and by cut-offs, inasmuch as a great deal less revetment has been constructed than was contemplated.

In Mississippi there are approximately 300 miles of levees. There are two levee districts.

MISSISSIPPI LEVEE BOARD

The Chief of Engineers estimated that the costs of rights-of-way in the Mississippi Levee District would be $1,099,624. Because of set-backs and as disclosed by the hearings, the costs to date aggregate approximately $1,500,000. The costs in this district are 50 percent more than the estimate of the Chief of Engineers.

YAZOO-MISSISSIPPI DELTA LEVEE DISTRICT

As disclosed by page 4805 of the hearings, 1927–28, Gen. Edgar Jadwin, Chief of Engineers, estimated that the total cost of the rights-of-way for this district would be $68,796. As disclosed by the hearings on the bill, this district has expended to date $852,152.58. This district has expended, therefore, more than 10 times the amount estimated by the Chief of Engineers that would be required by way of local contribution.

The additional amounts and the enormous costs for rights-of-way and damages to lands result from shortening the levees, moving them back much farther than was contemplated from existing levees, and from set-backs.

The local levee boards in Mississippi owe large, outstanding debts. The indebtedness of the Mississippi Levee Board is approximately $3,000,000, and the indebtedness of the Yazoo-Mississippi Delta Levee District is approximately $4,000,000. The interest and the bonds accrue annually.

As a result of the enormous costs of rights-of-way, the local interests have contributed since the adoption of the Flood Control Act of May 15, 1928, in Mississippi approximately as much in the aggregate as they contributed prior thereto.

SUMMARY

The bill is to clarify and effectuate the intent of Congress with respect to local contribution. No additional authorization is required, and no additional appropriation will be necessary. The whole project will be constructed for less than the amount authorized, largely because of set-backs. Many injustices have been done taxpayers who have not been compensated for lands between new levees and old levees. There will be no additional cost to the Government. There is no change in the engineering features. Local taxpayers will not be relieved from any of the provisions of the Flood Control Act of 1928. They are still required to provide rights-of-way for levees and to maintain the levees after their construction. The bill is an amendment to the Flood Control Act of 1928, and should be adopted.

In this proposed measure no change in the engineering features is involved, and no additional authorization is necessary. The money is provided in the original authorization.

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74TH CONGRESS } HOUSE OF REPRESENTATIVES { DOCUMENT
1st Session } { No. 305

VETO MESSAGE ON H. R. 7349, A BILL TO AMEND THE ACT ENTITLED "AN ACT FOR THE CONTROL OF FLOODS ON THE MISSISSIPPI RIVER AND ITS TRIBUTARIES, AND FOR OTHER PURPOSES"

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

RETURNING

WITHOUT HIS APPROVAL, H. R. 7349, ENTITLED "AN ACT TO AMEND THE ACT ENTITLED 'AN ACT FOR THE CONTROL OF FLOODS ON THE MISSISSIPPI RIVER AND ITS TRIBUTARIES, AND FOR OTHER PURPOSES', APPROVED MAY 15, 1928, AS AMENDED"

AUGUST 22, 1935.—Referred to the Committee on Flood Control and ordered to be printed

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To the House of Representatives:

I return herewith, without my approval, H. R. 7349, entitled "An act to amend the act entitled 'An act for the control of floods on the Mississippi River and its tributaries, and for other purposes', approved May 15, 1928, as amended."

This act provides that the United States shall pay for the cost of flowage rights over all lands which were protected by the main Mississippi River levees on May 15, 1928, but which have since been left, or may hereafter be left, on the river side of the controlling main river levee lines constructed on new locations under the adopted flood-control plan.

For the reasons set forth in the accompanying report of the Secretary of War, dated August 13, 1935, I do not feel that I would be justified in giving my approval to this legislation.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE, *August 22, 1935.*

SEVENTY-FOURTH CONGRESS OF THE UNITED STATES OF AMERICA; AT THE FIRST SESSION, BEGUN AND HELD AT THE CITY OF WASHINGTON ON THURSDAY, THE THIRD DAY OF JANUARY, ONE THOUSAND NINE HUNDRED AND THIRTY-FIVE

AN ACT To amend the Act entitled "An Act for the control of floods on the Mississippi River and its tributaries, and for other purposes", approved May 15, 1928, as amended

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first paragraph of section 3 of the Act entitled "An Act for the control of floods on the Mississippi River and its tributaries, and for other purposes", approved May 15, 1928, as amended (U. S. C., Supp. VI, title 33, sec. 702c), is hereby amended to read as follows:

"SEC. 3. The Secretary of War is authorized and directed, out of any money available under the provisions of said Act or amendments thereto, to purchase from or to reimburse the States or legally constituted and empowered local agencies or landowners for the cost of flowage rights over all lands including compensation for damages to improvements thereon at the time of the taking; that have been or may be acquired and paid for by States or such agencies in connection with the flood-control project herein adopted; embracing those areas which were protected by the main Mississippi River levees on May 15, 1928, but which have since been left or may hereafter be left, on the river side of the main river controlling levee lines constructed on new locations under the flood-control plan: *Provided,* That after careful investigation the prices are found to be reasonable: *And provided further,* That payments or reimbursements may be made as soon as the flowage rights provided for in this Act have been acquired in conformity with local customs or legal procedure in such matters and to the satisfaction of the Chief of Engineers: *And provided further,* That except when authorized by the Secretary of War, upon the recommendation of the Chief of Engineers, no money appropriated under authority of this Act shall be expended on the construction of any item of the project until the State or levee districts have given assurances satisfactory to the Secretary of War that they will (a) maintain all flood-control works after their completion, except controlling and regulating spillway structures, including special relief levees; maintenance includes normally such matters as cutting grass, removal of weeds, local drainage, and minor repairs of main river levees; (b) agree to accept land turned over to them under the provisions of section 4; (c) provide without cost to the United States all rights-of-way for levee foundations and levees on the main stem of the Mississippi River between Cape Girardeau, Missouri, and the Head of the Passes."

JOSEPH W. BYRNS,
Speaker of the House of Representatives.
HARRY S. TRUMAN,
President of the Senate pro tempore.

[Endorsement on back of bill:]
I certify that this act originated in the House of Representatives.
SOUTH TRIMBLE, *Clerk.*

WAR DEPARTMENT,
Washington, August 13, 1935.

The PRESIDENT,
The White House.

DEAR MR. PRESIDENT: I return herewith the act (H. R. 7349) to amend the act entitled "An act for the control of floods on the Mississippi River and its tributaries, and for other purposes", approved May 15, 1928, as amended.

The act provides that the United States shall pay for the cost of flowage rights over all lands which were protected by the main Mississippi River levees on May 15, 1928, but which have since been left, or may hereafter be left, on the river side of the controlling main river levee lines constructed on new locations under the adopted flood-control plan.

The Flood Control Act of May 15, 1928, contained as one of its major provisions an authorization for the raising and strengthening of the levees on the main stem of the Mississippi River wholly at Federal cost, the States or levee districts to furnish the necessary rights-of-way. The banks of the Mississippi River erode rapidly when attacked by the river currents, and because of the great depths in the river revetments to prevent this erosion are enormously expensive. The levees are, therefore, built far enough from the banks of the river to be out

of danger from caving into the river for a long period of years. In the reconstruction of the levees in accordance with the plan adopted in the Flood Control Act of 1928, levees were set back at a number of localities to assure that they would not be in hazard of destruction. These set-backs leave considerable areas of improved land subject to overflow. While in some cases the old levee lines would afford protection against all but extreme floods for a considerable period of years, yet the drainage of the land between the new and the old levee lines can be accomplished only through culverts in the new lines, which are viewed with strong disfavor by the local levee districts.

It is understood that in the State of Mississippi levee districts pay for the land between the old and new levees, as well as for the right-of-way of the new levee line, but that in other States payments are made for rights-of-way only, no compensation being made to the owners of the lands adversely affected by the set-backs.

The estimated cost of paying for the flowage provided for in this act is between $4,000,000 and $5,000,000. It would also place an indefinite and continuing obligation upon the United States with respect to the payment for flowage over lands affected by setbacks becoming necessary in the future.

The Federal Government has contributed generously toward the control of floods in the lower Mississippi Valley. I do not feel that any equitable or other considerations warrant the placing of an indefinite additional responsibility upon the Federal Treasury for the execution of the project as provided by this bill. The accomplishment of the flood-control project will add millions of dollars to the value of the property in the several States bordering the lower river, and contribute vitally to the well-being of our citizens. I feel that those benefited by the improvement can well afford to furnish all rights in land needed for the improvement of the main Mississippi River levees. For these reasons, I do not commend the act to your approval.

Sincerely yours,

GEO. H. DERN, *Secretary of War.*

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410785—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 346

LOUISIANA DELTA CATTLE CO., INC., PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 7–11) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on May 5, 1941 (R. 11). The petition for a writ of certiorari was filed on August 4, 1941. Petitioner invokes the jurisdiction of this Court under Section 288 of the Judicial Code as amended.

We assume, however, that it meant to rely upon Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

The question is whether the complaint alleges a taking, through the construction of a set-back levee pursuant to the Flood Control Act of 1928, of petitioner's land for which just compensation must be made under the Fifth Amendment. The complaint alleged:

1. The petitioner's land will be flooded and destroyed if the United States, as it intends to do, abandons or removes previously existing levees protecting petitioner's land.

2. Natural rainfall will convert the land into a bog or marsh unfit for use through lack of drainage, resulting from the construction of the set-back levee, stopping previously existing drainage outlets.

STATEMENT

Petitioner's action is one for just compensation under the Fifth Amendment to the Constitution of the United States for an alleged taking of its lands, as the result of acts undertaken by the United States pursuant to the Flood Control Act of May 15, 1928, 45 Stat. 534, 33 U. C. C., secs. 702a–702m. The court below, on the Government's motion, dismissed the petition on the ground that it failed to state a cause of action (R. 11). The facts as alleged in the petition filed in the court below (R. 1–6) are as follows:

Petitioner, a corporation organized under the laws of Louisiana, is the owner of certain tracts of land, embracing 4,663.52 acres located adjacent to or near the Mississippi River on its west side (R. 1–3). At the time of the acquisition of this property, it was protected against flood or water submergence by public levees erected upon it along the banks of the river (R. 3–4).

On or about July 13, 1931, the United States, pursuant to the Flood Control Act and the Jadwin Plan of Flood Control, selected and located a set-back or new levee line west of petitioner's land, or at least of some of it (R. 4). Work on the set-back levee was begun about September 1, 1931, and in or about July or October 1934 the levee was joined at its ends to the old levees (R. 4).

The alleged taking of property, upon which petitioner's claim is predicated, is based upon the following allegations: That the set-back levee "is intended to, does and will withdraw levee protection * * * and cause said Mississippi River permanently to overflow and destroy" petitioner's property (R. 4); that in the construction of the set-back levee "drainage outlets previously existing were stopped and made ineffective" (R. 4); and that by the construction of the set-back levee the United States has excluded petitioner's land from levee protection and drainage, whereby the land, "through lack of drainage, will be inundated by the natural rainfall * * * and converted into a bog or marsh unfit for cultivation

or other use, and whereby, in event of abandonment or removal of the previous levees around said property, which abandonment or removal * * * defendant purposes to accomplish and obtain," the river will permanently overflow petitioner's land (R. 4–5). In paragraph VI of the petition it is generally alleged that the United States "has deprived and does deprive" petitioner of levee and drainage protection previously existing; that it "has exposed" the lands to river overflow; and that it "has caused and does cause the land * * * to be and remain unprotected, to be overflowed and destroyed * * *" (R. 5).

Alleging that the acts of the United States have rendered its lands, with improvements, valueless and that prior to the construction of the set-back levee they were worth $159,002.05, petitioner seeks compensation in that amount, plus interest (R. 5, 6).

ARGUMENT

In dismissing the petition for failure to state a cause of action, the court below correctly followed the rule of *United States* v. *Sponenbarger,* 308 U. S. 256, and *Danforth* v. *United States,* 308 U. S. 271.

The alleged taking of petitioner's land is merely prospective, being based, in substance, upon the allegations (1) that the land will be overflowed by the river when the intended abandonment or removal of the old levees is effected; and (2) that the land will become a bog or marsh through lack of drainage.

1. While the petition includes the allegations that the set-back levee "does" withdraw levee protection from petitioner's land and cause the river permanently to overflow and destroy it (R. 4), and that the United States by its alleged acts "has caused and does cause" the land to be overflowed and destroyed (R. 5), the allegations in Paragraph V clearly indicate that the land will be overflowed only in the event that the old levees are abandoned or removed (R. 4–5). There is no allegation as to how the construction of the set-back levee could have resulted in overflowing petitioner's land, and, in the absence of any lowering, crevassing, or removal of the old levees, it would seem that "the land is as well protected from destructive floods as formerly." *Danforth* v. *United States,* 308 U. S. 271, 286.

The alleged intended abandonment or removal of the old levees, and the alleged consequent flooding of petitioner's land, "might never occur for many reasons" and petitioner is not entitled to compensation for an "apprehended flooding." *United States* v. *Sponenbarger,* 308 U. S. 256, 267–268; *Danforth* v. *United States,* 308 U. S. 271, 286. See *Bennington County Sav. Bk.* v. *United States,* 91 C. Cls. 160; *Albert C. Kirch* v. *United States,* 91 C. Cls. 196.[1] The speculative character of peti-

[1] In support of its claim, petitioner cites a bill which authorized payment of compensation for lands left unprotected on the river side of set-back levees (Pet. 9–10, 17–21). However, the bill was vetoed by the President (Pet. 22).

tioner's apprehension is enhanced by the facts noted in the *Sponenbarger* case that the right of self-defense against floods through locally built levees has not been taken away by the Flood Control Act of 1928 and that the War Department has treated the Act as leaving local interests free to raise proposed fuse plug levees if they wish. 308 U. S. at 268, 269.

2. Petitioner's allegation that through lack of drainage its land "will be inundated by the natural rainfall * * * and converted into a bog or marsh" (R. 4) is on its face an assertion merely of prospective damage. Hence the *Sponenbarger* and *Danforth* cases are equally decisive as to it. The petition in the court below contains no allegation that the alleged stoppage of drainage outlets existing prior to the construction of the set-back levee had in fact resulted in any inundation or other damage. Cf. *Bennington County Sav. Bk.* v. *United States, supra.* Since the drainage outlets allegedly were stopped in July or October 1934 (R. 4), and since the petition below was not filed until June 1937 (R. 1), there were thus nearly three years during which, it may be inferred, the injury apprehended by petitioner did not occur.[2] See *Albert C. Kirch* v. *United States,* 91 C. Cls. 196, 203.

[2] In its argument in support of its petition for certiorari petitioner implies that the conversion of its land into a bog is an accomplished fact (Pet. 11, 13). But the petition below contains no such allegation.

3. Petitioner's attempted distinction of the *Sponenbarger, Danforth,* and other cases relied on by the court below is without merit, as is its claim that the decision below conflicts with certain decisions of this Court. In two of the latter cases the damage had taken place and consequently a taking had been effected. *United States* v. *Lynah,* 188 U. S. 445, 449–450; *United States* v. *Welch,* 217 U. S. 333, 338. In the third case cited, this Court held that the repeated invasions of the land disclosed an abiding purpose on the part of the United States to create a servitude. *Portsmouth Co.* v. *United States,* 260 U. S. 327, 329. No such invasions are alleged here.

CONCLUSION

The decision below is correct and accords with the recent pronouncements of this Court. There exists no conflict. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Acting Solicitor General.
FRANCIS M. SHEA,
Assistant Attorney General.
PAUL A. SWEENEY,
H. G. INGRAHAM,
WALTER S. SURREY,
Attorneys.

SEPTEMBER 1941.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 346.

LOUISIANA DELTA CATTLE CO., INC.,
Petitioner,

v.

THE UNITED STATES.

PETITION FOR REHEARING.

(Certiorari denied, October 13, 1941.)

CAMDEN R. McATEE,
Attorney for Petitioner.

MASON, SPALDING & McATEE,
OGDEN AND WOODS,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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LOUISIANA DELTA CATTLE CO., INC.,
Petitioner,

v.

THE UNITED STATES.

PETITION FOR REHEARING.

(Certiorari denied, October 13, 1941.)

Petitioner, Louisiana Delta Cattle Co., Inc., by its attorney, respectfully moves the Court to set aside its order of October 13, 1941, denying writ of certiorari herein, and by rehearing the petition therefor, to grant same:

For cause, it is respectfully shown:

GROUNDS FOR REHEARING.

The petition for the writ stated as Specification of Error (p. 4):

The Court below erred:

(1) In holding said petition does not state a good and sufficient cause of action when tested by the motion to dismiss.

Disclaiming any purpose to impose by reiteration, petitioner respectfully submits as supplementary thereto:

(a) The petition below states a cause of action because the alleged and admitted destruction of the drainage of the acreage by the cut-off levee constitutes the destruction of an appurtenant property right that exists under civil law of Louisiana and is protected by the Constitution.

(b) The relief sought by petitioner is to be ascertained, not from one paragraph, but on the contrary from all the paragraphs of the petition below.

ARGUMENT.

The short question is the sufficiency of the petition below, with its allegations admitted by the motion to dismiss, to entitle petitioner to be heard upon the merits of its claim of constitutional right to compensation for the taking of its private property for public use. Presentation of the question is difficult because its possible *per curiam* disposal suggests expansion of the petition for the writ and its brief into the detail usually found in the brief upon the merits after grant of certiorari. Consideration of the question is especially important to the petitioner because the Court of Claims judgment of dismissal is of first instance, and its review is only a matter of discretion upon a petition for certiorari.

This short question involves new horizons. Present judicial view of them involves the possibility of new issues arising in the present case as the result of the abandonment by Congress of the Eads plan of 1883[1] and the substitution of the new Jadwin plan of 1928[2] for flood control. Illustrative of such new horizons, is the 1928 provision for recovery if land is damaged by the erection of new levees on the op-

[1] Summarized in *Jackson* v. *United States*, 230 U. S. 22, 23.

[2] Summarized as the substituted plan in *United States* v. *Sponenbarger*, 308 U. S. 256, 261.

posite bank of a river;[3] or the right of recovery here when it will appear (as found by the Court below in another case[4] referred to in the opinion below herein, (R. p. 10), as containing matter of fact not yet appearing in this case) that both the river side levees joined to the cut-off levee and the cut-off levee were all broadened and raised 3½ feet, to the 1928 plan, and have thereby imposed greater burdens upon the weaker river-side levees of 1914 grade and elevation, around the petitioner acreage; or when it appears the self-defense right of fuse-plugs, put forward as a permitted and sufficient remedy of the encircled petitioner in the Opposition Brief, (p. 6), cannot be exercised in the cut-off levee[5], and in the weaker river-side levees would but invite invasion by the river waters; or when it is admitted the cut-off levee stopped and destroyed the property right

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[3] (a) noted as unnecessary for decision in *United States* v. *Sponenbarger* (*supra*), p. 270.

(b) denied under the Eads plan legislation in *Jackson* v. *United States* (*supra*).

[4] *Bennington County Savings Bank* v. *United States*, 91 Ct. Cls. 160. It seems reasonable to assume this Court will judicially notice the findings therein as did the court below in its opinion to note the evidentiary facts as to the changes effected by the 1928 Flood Control operations, to wit:

> "The New Levee was built to the grade and section standardized in 1928 which is about 3½ feet higher than the 1914 grade and section, with proportionately wider base. At the same time the old levee above and below Wilson Point New Levee previously of the 1914 grade and section, was, with the exception of that portion extending around Bunches Bend, raised and enlarged to the 1928 grade and section, so that thereafter the Wilson Point New Levee formed a part of a uniform levee higher and larger than that around the remaining boundary of Bunches Bend. Bunches Bend is accordingly protected from the river only by a levee of 1914 grade and section rather than by a levee of 1928 grade and section."

[5] *United States* v. *Sponenbarger* (*supra*), citing Act of March 3, 1899 (33 U. S. C. A. 408).

of drainage appurtenant to petitioner acreage under the civil law of Louisiana.[6]

The right to be heard upon such matters is respectfully asserted where it appears by the allegations, admitted as facts by the motion to dismiss, that, with reference to the new levee line established by the cut-off levee being joined into the river-side levees at its ends, the petitioner plantation is placed on the river side, without drainage or means of self-defense against an annual seasonal 60 inch rain-fall and seepage, so that its arable lands are changed into bog, and so that, upon the intended dissolution of its weakened riverside levees, the plantation lands will be entirely wasted into the river. In the Flood Control Act of 1928, Congress distinctly disclaimed further reliance upon the principle of local contribution to flood control.[7]

Such situation is submitted to invite the discretion of this Court as perhaps not sufficiently presented or emphasized in the petition for the writ, and, consequently, as perhaps not entirely understood in the original consideration thereof. Such situation, provoked by the execution of the Jadwin plan, is submitted notwithstanding that, in a similar case, arising under the Eads plan of 1883, but not involving the present issue of drainage-stoppage, this Court held such encirclement did not result in a compensible taking. In so deciding, the Court excluded the drainage issue because it

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[6] Turning judicial notice again, as suggested in Note 4, to the Bennington case, it may be the admitted stoppage of drainage herein was disregarded below because the Court found the Bennington drainage was not affected. The findings set out the evidentiary facts as to the drainage and stoppage generally alleged by the present petitioner as follows:

> "Along the center line of Bunches Bend is a drainage ditch or canal, called Jack Falls Drainage Canal. This canal originates in the upper or northern end of Bunches Bend, and before the construction of the Wilson Point New Levee it terminated and emptied some distance beyond in Lake Providence. * * *"

The defendant closed Jack Falls Drainage Canal July 31, 1934.

[7] Petition, pp. 2, 17.

appeared claimant has been compensated therefor by the state.[8]

This recognition of drainage-stoppage as compensible serves to introduce its materiality to the first proposition herein submitted as a ground for reconsideration.

(a) The Petition Below States a Cause of Action Because the alleged and Admitted Destruction of the Drainage of the Acreage by the Cut-off Levee Constitutes the Destruction of an Appurtenant Property Right that Exists Under Civil Law of Louisiana and is Protected by the Constitution.

The petition for the writ, (p. 15), emphasizes the right to drainage, but only as equivalent to a right of way.

If the matters now suggested be sufficiently pertinent to the interests of justice, it follows that this Court has recognized explicitly the civil law doctrine that upholds the natural right or easement of drainage as between dominant and servient estates, and the contrary common law doctrine that denies such right. It has further explicity said in the same opinion:

> "If a case came to this Court from one of the states in which the doctrine of the civil law obtains, it would become our duty, having respect to this which is a matter of local law to follow the decisions of that state. And in like manner we should follow the adverse ruling in a case coming from one of the states in which the common law rule is recognized."[9]

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[8] *Hughes* v. *United States*, 230 U. S. 24, 32.

[9] *Walker* v. *New Mexico & S. P. R. Co.* (1897), 165 U. S. 593, 604.

The civil law doctrine, prevailing in Louisiana, is expressly stated in its civil code[10], and upheld in its jurisprudence.[11]

The right is a vested one protected by the Constitution[12], and is inclusive of the flow of seepage waters that accummulate behind levees as the result of flood conditions.[13]

The denial by the judgment below that the appurtenant property right of petitioner to drainage of its acreage is not compensible when admittedly and presently destroyed by the set-off levee is submitted as ignoring the sufficiency of the petition. It further suggests consideration of the judgment as presenting a conflict with local law, or as requiring the exercise of supervisory power herein.

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[10] Civil Code of Louisiana, Section 660 (quoted as appearing in *Caldwell* v. *Gore*, 175 La. 502, 143 Sou. 387):

> "It is a servitude due by the estate situated below to receive the waters which run naturally from the estate situated above, provided the industry of man has not been used to create that servitude. The proprietor below is not at liberty to raise any dam, or to make any other work, to prevent this running of the water. The proprietor above can do nothing whereby the natural servitude due by the estate below may be rendered more burdensome."

[11] *Martin* v. *Jett* (1838), 12 La. 501, 52 Am. Dec. 120n.
Hebert v. *Hudson* (1839), 13 La. 54.
Hays v. *Hays* (1841), 19 La. 351.
Hooper v. *Wilkinson* (1860), 15 La. Ann. 497, 77 Am. Dec. 194.
Minor v. *Wright* (1864), 16 La. Ann. 151.
Foley v. *Godchaux* (1896), 48 La. Ann. 466, 19 Sou. 247.
Petit Anse Coteau D. D. v. *Iberia & V. R. Co.* (1910), 124 La. 502.
Caldwell v. *Gore, supra.*

[12] *Hooper* v. *Wilkinson, supra.*
Miller v. *Letzerich*, —— Tex. ——, 49 S. W. (2) 404.

[13] *Gray* v. *McWilliams*, 98 Calif. 157, 32 Pac. 967.

(b) The Relief Sought by Petitioner is to be Ascertained Not from One Paragraph, but on the Contrary from All the Paragraphs of the Petition Below.

The gravamen of the claim is presented in Paragraphs IV V and VI, (R. pp. 3-5), without evidentiary detail.[14]

It is submitted as evident that neither these allegations nor the summary of same put into the opinion below, (R. pp. 7-9), justify the conclusion, (R. p. 9), of the opinion:

> "There is no allegation that anything has been done so far that has actually injured or impaired plaintiff's

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[14]

Paragraph IV	Paragraph V	Paragraph VI
Paragraph IV alleges the situation before and after erection of the set-back levee, and that it "*is intended to, does and will withdraw levee protection*" "*that said new levee was tied into the previously existing levees in , 1934, and drainage outlets previously existing were stopped and made ineffective.*"	Paragraph V alleges "*by said Levee defendant has segregated and excluded all land and improvements from levee protection and drainage, whereby (they), through lack of drainage will be innundated by natural rainfall, which averages 60 inches annually and converted into a bog or marsh unfilled for cultivation, and whereby, in event of abandonment or removal of the previous levees * * * which defendant purposes to accomplish and obtain, the river waters will * * * break through * * * putting said lands permanently in the bed of the river * * * and the lands will be made unfit and entirely destroyed.*"	Paragraph VI alleges "*defendant has deprived and does deprive plaintiff of levee protection * * * and of drainage * * * and has exposed the lands and improvements to the overflow and ravages of the river water * * * and to be taken for public use, damaged and destroyed without compensation.*" * * *

property or deprived plaintiff of its use in whole or in part."

The statement of a cause of action in the several paragraphs is submitted sufficient when tested by the equivalence of the compensation claimed in the present action, upon an implied contract for the taking without condemnation, to the compensation to be awarded in a condemnation proceeding to obtain the taking.[15] The time of taking is fixed by its occurrence or by statute usually, and if there is no occurrence and no time fixed by statute, as is the case of the Flood Control Act, the time of taking becomes the time of payment of the compensation.[16] If there had been a condemnation proceeding before the alleged taking herein its allegations and evidence must have been of prospective matter.[17] In the implied liability proceeding instituted subsequent to the alleged taking, the allegations and evidence again are both prospective and retrospective, in that the taking provokes consequences, the occurrence of which establishes its consummation and extent. The petition below frames the taking, its natural and inevitable ultimate consequences, and their consummation, and raises its claim thereon. The allegations of taking supported by the admitted overt acts become conclusions of fact and not of law.[18]

The petition below is further submitted sufficient because a claimant is not held bound by special rules of pleading in the Court of Claims so as to be precluded from recovery of

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[15] *Hurley* v. *Kincaid*, 285 U. S. 95, 104.

[16] *Danforth* v. *United States*, 308 U. S. 271, 284, (decided subsequent to the filing of the petition below).

[17] *Olsen* v. *United States*, 292 U. S. 246, 257.

[18] *Portsmouth Harbor L. & H. Co.* v. *United States*, 260 U. S. 327, 330.

what appears justly due in another aspect from that in which the demand is conceived.[19]

CONCLUSION.

Upon further consideration, it is submitted the denial of the petition should be vacated, and such further relief be granted as the justice of the case may require.

Respectfully,

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[19] *United States* v. *Burns*, 79 U. S. (12 Wall. 246, 245.
Clark v. *United States*, 95 U. S. 539, 543.
United States v. *Behan*, 110 U. S. 338, 347.
Wisconsin C. R. Co. v. *United States*, 164 U. S. 190, 212.
District of Columbia v. *Barnes*, 197 U. S. 146, 154.